

PB Securities Sdn Bhd v Ho Say Fong

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HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO D1–22–3
OF 1999

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AMELIA TEE ABDULLAH JC
23 OCTOBER 2009

Civil Procedure — Pleadings — Issue not pleaded — Reliance on issue not raised in pleadings — Issue of unfairness of incentive bonus scheme never pleaded — Whether pleading that scheme contravened provisions in law amounted to pleading about unfairness

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Securities — Remisier — Relationship with stockbroking company — Liability to indemnify stockbroking company — Losses arising from client's failure to pay for trades — Whether indemnity provision part of remisier's agreement with stockbroking company — Whether stockbroking firm may deduct from monies due to remisier under incentive bonus scheme

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The plaintiff was a stockbroking company and the defendant was a former employee of the plaintiff, employed as a paid dealer's representative. The plaintiff claimed against the defendant, inter alia, a sum of RM6,921,230.04 pursuant to the defendant's agreement to indemnify the plaintiff for any losses or liability arising from the failure of the defendant's client to pay for trades. The defendant claimed that the indemnity provision was not part of the agreement dated 19 December 1994 and signed by the defendant. She further contended that the application for the opening of the account of one Joseph Lee was not undertaken by her but by another dealer's representative named Gary Tan. The defendant counterclaimed against the plaintiff for a sum of RM549,871.48 being amounts allegedly deducted from monies due to her. The plaintiff's defence to the counterclaim was that the incentive bonus scheme ('IBS') was a discretionary scheme and that a dealer was only entitled to the bonus where the nett profit of the plaintiff generated from the trades of clients managed by the dealer was more than the sum total of the dealer's monthly salary and all other expenses, including contra losses incurred by the dealer. The plaintiff contended that the deductions made by them were permitted deductions under the IBS and that they were not in breach of any laws.

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A **Held**, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim:

- B** (1) When the account of Joseph Lee was initially opened, it was handled by Gary Tan. The defendant did not dispute that she later took over the handling of Joseph Lee's account from Gary Tan or that she was thereafter responsible for putting through the trades of Joseph Lee. The defendant had never complained that any trades had been wrongly attributed to her dealership code (see paras 28–29).
- C** (2) The issue about the unfairness of the IBS was never pleaded by the defendant. At best, the defendant had only pleaded that the IBS 'had in certain regards and aspects of the scheme contravened provisions in law contractually and with regards (to) employment'. This did not amount to a pleading about the unfairness of the IBS. Accordingly, the
- D** defendant was not entitled to rely on this argument (see para 37).
- E** (3) Nowhere in the offer of employment was there a provision for any kind of indemnity. However cl 2.3 imposed a burden on the defendant to pay the plaintiff for, inter alia, any loss suffered by the plaintiff by any act or default of the defendant whilst in the service of the plaintiff. This clause was broad enough to cover a situation where the plaintiff suffered loss through the acts or defaults of the defendant when putting in trades of the clients managed by her. The absence of an express indemnity provision in the offer of employment did not prima facie mean that the IBS and the defendant's acceptance of it was unlawful (see paras 38–39
- F** & 41).
- G** (4) There was no basis or merit in the defendant's counterclaim. The alleged unlawful deductions complained of by the defendant were not in truth deductions to the defendant's salary but was merely the method employed by the plaintiff to calculate or arrive at the quantum of incentive bonus that the defendant would have been entitled to be paid. The defendant did not dispute the method of calculating the incentive bonus (see para 46).

H **[Bahasa Malaysia summary]**

I Plaintiff merupakan syarikat broker saham dan defendan merupakan bekas pekerja plaintiff, yang diambil bekerja sebagai wakil peniaga berbayar. Plaintiff menuntut terhadap defendan, sejumlah RM6,921,230.04 mengikut perjanjian defendan untuk menanggung rugi plaintiff untuk mana-mana kerugian atau liabiliti yang timbul daripada kegagalan klien defendan untuk membayar dagangan. Defendan mendakwa bahawa peruntukan penanggungan rugi bukanlah sebahagian daripada perjanjian bertarikh 19 Disember 1994 yang ditandatangani oleh defendan. Dia selanjutnya

menghujah bahawa permohonan untuk membuka akaun oleh Joseph Lee tidak dijalankan olehnya tetapi oleh wakil peniaga lain yang bernama Gary Tan. Defendan menuntut balas terhadap plaintif bagi jumlah RM549,871.48 yang merupakan amaun yang dihujahkan sebagai jumlah yang ditolak daripada wang yang dibayar kepadanya. Pembelaan plaintif untuk tuntutan balas ialah bahawa skim bonus insentif ('SBI') merupakan skim budi bicara dan bahawa peniaga hanya berhak kepada bonus di mana keuntungan bersih kepada plaintif dijanakan daripada dagangan klien-klien yang diuruskan oleh peniaga melebihi jumlah keseluruhan gaji bulanan peniaga dan semua perbelanjaan lain, termasuk kerugian kontra yang ditanggung oleh peniaga. Plaintif menghujah bahawa penolakan-penolakan yang dibuat oleh mereka merupakan penolakan-penolakan yang dibenarkan di bawah SBI dan bahawa mereka tidak melanggar mana-mana undang-undang.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan:

- (1) Apabila akaun Joseph Lee dibuka, ia diuruskan oleh Gary Tan. Defendan tidak mempertikaikan bahawa dia kemudiannya mengambil alih pengurusan akaun Joseph Lee daripada Gary Tan atau dia kemudiannya bertanggungjawab membatalkan dagangan Joseph Lee. Defendan tidak pernah mengadu bahawa mana-mana dagangan secara salah disebabkan oleh kod hak jualannya (lihat perenggan 28–29).
- (2) Isu mengenai ketidakadilan SBI tidak pernah diplid oleh defendan. Defendan hanya memplid bahawa SBI 'had in certain regards and aspects of the scheme contravened provisions in law contractually and with regards (to) employment'. Ini bukanlah pliding mengenai ketidakadilan SBI. Oleh itu, defendan tidak berhak untuk bergantung kepada hujahan ini (lihat perenggan 37).
- (3) Tidak dinyatakan dalam mana-mana tawaran pekerjaan mengenai peruntukan penanggungan rugi. Walau bagaimanapun, klausa 2.3 mengenakan beban ke atas defendan untuk membayar plaintif bagi mana-mana kerugian yang dialami oleh plaintif melalui tindakan atau kemungkiran defendan ketika berkhidmat kepada plaintif. Klausa ini mencakupi situasi di mana plaintif mengalami kerugian melalui tindakan-tindakan atau kemungkiran-kemungkiran defendan apabila menjalankan dagangan klien-klien yang diuruskannya. Ketiadaan peruntukan penanggungan rugi tersurat dalam tawaran pekerjaan bukan prima facie bermaksud bahawa SBI dan penerimaan defendan adalah menyalahi undang-undang (lihat perenggan 38–39 & 41).
- (4) Tidak terdapat dasar atau merit dalam tuntutan balas defendan. Penolakan-penolakan menyalahi undang-undang yang dihujahkan

- A bukan merupakan penolakan gaji defendan tetapi hanya kaedah yang digunakan oleh plaintif untuk mengira atau mencapai bonus insentif yang berhak dibayar kepada defendan. Defendan tidak mempertikaikan kaedah mengira bonus insentif (lihat perenggan 46).]

B **Notes**

For cases on issue not pleaded, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5447–5451.

For cases on relationship with stockbroking company, see 11 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 917–919.

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Cases referred to

Mayban Securities Sdn Bhd v Kassim Mahat [2008] 8 CLJ 715, HC (refd)

Serangoon Garden Estate Ltd v Marian Chye [1959] MLJ 113, HC (refd)

Sime Securities Sdn Bhd (formerly known as UMBC Securities Sdn Bhd) v Wong

- D *Kok Wah* [2005] 4 MLJ 621, HC (refd)

Shanti Mogan (Chai Siew Wan with her) (Shearn Delamore & Co) for the plaintiff.

David Lingam (Goh Chuan Chean with him) (David Lingam & Co) for the defendant.

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Amelia Tee Abdullah JC:

- F [1] The plaintiff, *PB Securities Sdn Bhd*, now known as Public Investment Bank Bhd, is a stockbroking company and a member of the Kuala Lumpur Stock Exchange. The defendant, *Ho Say Fong*, was a former employee of the plaintiff, employed as a paid dealer's representative.
- G [2] The plaintiff's claim against the defendant is for a sum of RM6,921,230.04, outstanding interest amounting to RM1,032,374.20 as at 13 November 1998, interests and costs arising from an indemnity given by the defendant under an agreement dated 19 December 1994 whereby the defendant had allegedly agreed to indemnify the plaintiff for any losses or
- H liability arising from, inter alia, the failure of the client handled by the defendant to pay for his trades. In the alternative, the plaintiff contends that for every customer's account that was opened, the defendant had agreed to be responsible for any debts owing by the customer.
- I [3] The plaintiff's claims in paras 4 & 5 of the statement of claim were disputed by the defendant. Instead, the defendant contends that the indemnity provision referred to in para 4 was not part of the agreement of 19 December 1994. She further contends that the application for the opening of the account of Joseph Lee Yoke Min was not undertaken by her but by

another dealer's representative named Gary Tan on 6 March 1995 and that the purported immunity was given by the said Gary Tan. The defendant contends that she was employed as a paid salaried dealer's representative to look after the institutional clients of the plaintiff as opposed to a commissioned dealer's representative or remisier.

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[4] The defendant further contends that the alleged debt of RM6,921,230.40 and interest of RM1,032,374.20 as at 13 November 1998 and still continuing, allegedly incurred by Joseph Lee Yoke Min, was disputed by the said Joseph Lee Yoke Min.

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[5] The defendant counterclaimed against the plaintiff for a sum of RM549,871.48 being amounts allegedly deducted from monies due to her which she claimed should have been borne by the plaintiff.

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[6] The plaintiff's defence to the counterclaim was that the incentive bonus scheme ('IBS') was a discretionary scheme and that a dealer was only entitled to the bonus where the nett profit of the plaintiff generated from the trades of clients managed by the dealer is more than the sum total of the dealer's monthly salary and all other expenses and outgoings, including contra losses incurred by the dealer. The plaintiff contends that the deductions made by them were permitted deductions under the IBS and that they were not in breach of any laws.

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[7] The plaintiff called five witnesses from Public Investment Bank, namely:

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- (a) Goh Keat Lye, the manager of the credit department;
- (b) Lim Jit Seng, its deputy general manager;
- (c) Omar bin Abdul Aziz, the senior manager for institutional sales;
- (d) Cheah Boey Lay, an executive in the business processing department; and
- (e) Mariah bt Ahmad, an executive in the contracts department.

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[8] The defendant did not call any witness but relied solely on her own evidence in support of her case.

[9] It is clear from the evidence adduced by the plaintiff's witnesses supported by documentary evidence that the defendant was offered employment by the plaintiff as a senior manager, institutional sales, at a monthly basic salary of RM5,000 per month vide an offer of employment dated 19 December 1994. The defendant accepted the offer as evidenced by

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- A her acceptance with her signature at p 64. The acceptance is dated 20 December 1994. It is noted that the clause on 'Benefits and other terms and conditions' states that her other terms and conditions of employment would be as indicated in the attached Appendix I. These other terms and conditions are as set out in pp 68–74 of bundle 'B'.
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- C [10] The defendant has alleged that she was never given Appendix I. In determining whether this evidence is acceptable, I have considered the fact that when she signed and accepted the offer of employment, she would have known about Appendix I which was clearly stated in the body of the offer letter to be attached therewith. If it was not so attached, surely the defendant would have enquired about it. Further I find that the contents of the said Appendix I refer to matters which the defendant could not conceivably have afforded not to know. Appendix I contains, inter alia, provisions on annual leave, compassionate leave, medical leave, maternity leave, medical benefits and hospitalisation. In light of the contents of Appendix I and the fact that it is specifically mentioned in the letter of offer as being attached, I would reject the contention of the defendant that she was not given Appendix I.
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- E [11] Much has been said about the incentive bonus scheme ('IBS') and whether the plaintiff can rely on the indemnity clause of the IBS (Appendix A). It is the defendant's case that the plaintiff did not plead the indemnity provision under the IBS and therefore could not rely on it. The defendant has also pointed out that the plaintiff had, vide a summons in chambers dated 6 March 2008, applied to amend the statement of claim to specifically plead the reference to Appendix A but the application was dismissed by the learned judge Dato' Mohd Hishamudin bin Mohd Yunus.
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- G [12] The plaintiff, on the other hand, has submitted that both the letter of offer as well as the indemnity in Appendix A had been expressly pleaded although the words 'Appendix A' had not been pleaded.
- H [13] I have carefully perused the pleadings as well as the documents in question when considering this issue. Whilst it is true that the words 'Appendix A' does not appear anywhere in the statement of claim, however, the contents and wording of sub-cll C(2) and (3) are clearly reflected and appears in sub-paras 4.1 and 4.2 of the statement of claim. The confusion or error would appear to have arisen with the use of the words 'The said agreement' in para 4 which would refer to the agreement dated 19 December 1994 in para 3.
- I [14] I have also considered whether the use of the words 'The said agreement' in para 4 would have had the effect of misleading the defendant as to the source of the indemnity provision. It is noted that in the statement

of defence and counterclaim, the defendant has categorically stated that the 'purported Agreement of 19th December 1994 did not contain or include the terms and conditions as specified in Paragraph 4 of the Statement of Claim'. And in the counterclaim, the defendant acknowledges the existence of the IBS when she claims RM549,871.48, which amount was allegedly wrongfully deducted in the implementation of the IBS.

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[15] I am thus of the view that taking into account the entire pleadings in totality, the clear knowledge of the defendant as regards the IBS on which her counterclaim is based, as well as sub-paras 4.1 and 4.2 of the statement of claim which were clearly drawn from sub-cll C(2) and (3) of the IBS, the plaintiff has in fact pleaded the indemnity provision in the IBS. The fact that the words 'Appendix A' are not mentioned in the statement of claim does not detract from this finding. I am of the view that the court's finding in this respect would not in any way prejudice the defendant as the existence of the IBS and its contents were well within the knowledge of the defendant. That being so, I find that the plaintiff is entitled to rely on the indemnity provision of the IBS in establishing its case.

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[16] What then is this incentive bonus scheme or IBS? Evidence has been led by the plaintiff's witnesses as regards the incentive bonus scheme ('IBS'). At pp 65–67 of the agreed bundle B, Goh Keat Lye ('SP1'), the manager of the credit department of the plaintiff, had explained that the IBS was a scheme designed by the plaintiff to pay bonuses to dealers' representatives. This bonus is paid from commissions generated from the transactions of buying and selling shares in the clients' accounts managed by the dealers' representatives. The commission belongs to the plaintiff as it is income earned by the company from brokerage charged on each client's purchase and sale contracts. The IBS was put in place to attract dealers' representatives as it rewards them with an incentive bonus based on their performance.

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[17] I make a clear finding that the defendant had participated in this incentive bonus scheme. This is reflected in her signature, identity card no and the date 20 December 1994 which was appended at the bottom of p 67. Two important clauses found in the IBS are cll B and C and they are now reproduced below for ease of reference:

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B) Liabilities of Clients

You shall, be responsible and liable for discharging all obligations and payments to us and/or for all monies due and payable to us and/or in respect of all whatsoever transactions or dealings carried out or entered into by you and/or your clients.

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A C) *Indemnity*

In consideration of all the aforesaid —

(1) ...

B (2) You shall indemnify us and keep us indemnified against all claims, losses and liabilities whatsoever caused by the non payment and/or non-observance on your part, and or clients handled by you or any contract entered into between you with your clients on behalf of the Company including the cost of any litigation.

C (3) You shall be responsible for bad debts, losses and any amount due from your clients and shall indemnify us for such amount.

D [18] The defendant does not deny that she signed the incentive bonus scheme document at Appendix A. In cross-examination, she admitted signing both the offer of employment as well as the incentive bonus scheme document on 20 December 1994, albeit not simultaneously. She agreed that pursuant to sub-cll C(2) and (3), she would be responsible for the bad debts and losses incurred by clients of the plaintiff handled by her and that she would have to indemnify the plaintiff for such amounts. I find this admission to be extremely pertinent.

F [19] However, during re-examination, the defendant sought to explain that after she had signed the offer of employment, she had gone to the office to return the document and that was when she was given the incentive bonus scheme document to sign. According to her:

G They said that it was a standard document that everybody signed and it was just a formality.

At the time that I signed pp 65–67, I was told that this is just a formality. I am not aware about the indemnity. I signed the document and gave it back.

H [20] I have considered this evidence of the defendant in the light of her admission that she was employed as a *senior* manager with emphasis on the word senior. To obtain a license as a dealers' representative, she was required to have a basic degree or diploma and had to undergo an interview with the exchange. She admitted that when she joined the plaintiff, she had knowledge about the stock exchange and the buying and selling of shares. I find that with such knowledge, it is inconceivable for the defendant to claim to be unaware of the responsibilities of her position as well as the inherent risks of her job. To say that she was unaware about the indemnity and that she signed Appendix A as a formality goes beyond the realm of belief. I have no

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hesitation in finding that the defendant's protestations about being misrepresented as to the contents of the IBS to be but a mere afterthought and an attempt to avoid liability.

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[21] In coming to this conclusion, the court finds support in the case of *Serangoon Garden Estate Ltd v Marian Chye* [1959] MLJ 113 submitted by learned counsel for the plaintiff where at p 114 the court had held as follows:

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I think it is quite clear that when a party signs a contract knowing it to be a contract which governs the relations between them, then, to use the words of Denning J in the case of *Curtis v Chemical Cleaning and Dyeing Co*, 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation'. In *L'Estrange v F Graucob Ltd*, Scrutton LJ said 'When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not'.

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[22] In this case the defendant has not claimed that she was induced into signing Appendix A through fraud. Although she makes an attempt to allege that she was misled into signing the document through the misrepresentation that it was just a formality, I find that this bald assertion without more to be not only unlikely but wholly unbelievable. The very nature of the IBS with its inherent possibilities of both substantial gains and benefits as well as dire pitfalls cannot be viewed as a mere formality. Anyone who has dealings within the stock broking industry would have known it. So too should the defendant who was appointed as no less than a *senior* manager of institutional sales.

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[23] Apart from its reliance on the indemnity provision under the incentive bonus scheme, the plaintiff is also relying on the agreement of the defendant to be liable for the debts incurred by her clients as contained in the account opening form.

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[24] From the evidence adduced, it is amply clear that when the account of Joseph Lee Yok Min @ Ambrose was initially opened with the plaintiff in March 1995, it was handled by a dealer's representative named Gary Tan. His name and signature on the account opening form as well as the code DGT at p 81 of bundle B would confirm this fact. In light of the fact that a trading account was in fact opened by the plaintiff for Joseph Lee, I find that presence of a number of unfilled spaces in the said account opening form to have minimal importance.

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[25] The defendant admits that in March 1995, she did not have a dealer's license. It is significant that the defendant does not dispute that she took over

- A the handling of Joseph Lee's account from Gary Tan or that she was thereafter responsible for putting through the trades of Joseph Lee. The only issues in which the parties are at variance in respect of this issue is whether the defendant had signed or initialed the account opening form when she took over the handling of Joseph Lee's account from Gary Tan and whether she or
- B Gary Tan should be responsible for the losses incurred in the trading of Joseph Lee's account.

- C [26] The defendant has categorically denied that the initial or 'squiggle' found beside the signature of Gary Tan at p 84 ('PI') is hers. It is the defendant's case that no one had asked her to sign the account opening form and that she did not sign it.

- D [27] In respect of this issue, the evidence of Cheah Boey Lay ('SP4') must be noted. At the material time between 1994 and 1998, she was the assistant supervisor in the contracts section of the business processing department, then known as the operations department. Her job functions at that time entailed verification of the opening of trading accounts as well as verification of the trades booked out under each account. It is her evidence that as part
- E of her job, she and her staff would ensure that account opening forms were completed and signed, details of the account opening form were correctly keyed into the system and that trades booked out were correctly entered into the system. In light of her duties as stated above, SP4 would be a witness who was well placed to testify as to who were the dealers who were handling the
- F different accounts as well as to identify the signatures or initials of the respective dealers.

- G [28] Cheah Boey Lay testified in court that Joseph Lee's trading account was first handled by Gary Tan with the dealer's code 'DGT' and that the account was subsequently transferred to the defendant and the dealer's code was changed to 'DHO' representing dealer Ho Say Fong. Her recorded evidence appears as follows:

- H My department ensured the original account opening form on pp 81–84 of bundle A Part B was filled out and signed and we keyed in the data in the account opening form into the system. Subsequently, when the account was to be transferred to Ho Say Fong, *my department ensured the account opening form was signed by Ho Say Fong and the transfer to Ho Say Fong was keyed into the system.* (Emphasis added.)

- I [29] Cheah Boey Lay told the court that she was familiar with the defendant's signature. This was because she was involved in the keying in of the data in bargain slips signed by the various dealers' representatives, including the defendant. She identified the signature found next to Gary Tan's signature at p 84 as that of the defendant's. She referred to the bargain

slips at pp 85–90 and pointed out that the signatures on those pages were similar to the signature in the account opening form at p 84. She told the court that the data in the bargain slips were entered into the system by her department and that she had checked the entries in the system against the physical bargain slips filled out by the defendant. The defendant had never complained that any trades had been wrongly attributed to her dealership code.

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[30] In her evidence in court, the defendant had not disputed that she had filled out the bargain slips at pp 85–90. When asked whether it was her signature or mark next to the words ‘DEALER/RMR’, her answer was: ‘Yes looks like it’.

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[31] Looking at the totality of the evidence adduced on this issue, I would accept the evidence of Cheah Boey Lay that administratively, her department would have arranged for Joseph Lee’s account opening form to be signed by the defendant and for the transfer of the said account to the defendant to be keyed into the system. I further accept that the mark or squiggle next to Gary Tan’s signature on the said form was the signature of the defendant as identified by Cheah Boey Lay. As such, it is my finding that the defendant had indeed signed or initialed the account opening form when she took over the handling of Joseph Lee’s account.

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[32] The next issue to consider is the question of whether the defendant should be responsible for the losses incurred in the trading of Joseph Lee’s account. The defendant contends that it is Gary Tan and not she who should be responsible for the said losses. I find this argument to be totally incomprehensible and unacceptable for the following reasons:

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- (a) the defendant had admitted in her evidence in court that she had put in the trades of Joseph Lee and that by putting in such trades, she had taken over the handling of Joseph Lee’s account from Gary Tan. It is also extremely pertinent that the defendant had admitted and confirmed that the three trades which led to the contra losses of RM6,951,230.04 were all put in by her;
- (b) the contract notes for the three trades as shown in pp 91–93 in respect of which the contra losses of RM6,951,230.04 were incurred would show that it was the defendant who had put in the said trades as evidenced by her dealer code DHO on the said contract notes;
- (c) the existence of various memos issued by the defendant in respect of Joseph Lee’s account. These range from escalating a request by Joseph Lee for a RM1m increase in trading limit to purchase Suria Capital Holding Bhd shares (p 124), explaining why force selling in respect of Joseph Lee’s account was only done on 31 December 1997 (pp 125 &

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- A 126), informing Nizam Razak that the client, Joseph Lee, had remitted RM4m as deposit to raise his trading limit to RM10m (p 127) and informing credit control that the client, Joseph Lee, had not paid his contra losses amounting to RM6,956,425.96 and asking them to take follow up action (p 129). The existence and contents of these various
- B memos would clearly show that the defendant was in charge and control of dealing with the account and trades of the said Joseph Lee.

- C [33] Based on the above, I find that the defendant, by virtue of her taking over the handling of Joseph Lee's account from Gary Tan, had bound herself to be responsible for making good any bad debts incurred by the said client. This is so notwithstanding that the defendant was not the original dealer's representative who had requested for the opening of Joseph Lee's account. Any suggestion that Gary Tan should still be responsible for the losses incurred in Joseph Lee's account after he was no longer dealing with the said
- D account and after it was taken over and handled by the defendant would be repugnant and contrary to all common sense and totally unacceptable. I therefore find that the defendant, by signing on the account opening form after the account was initially opened *and* taking over the handling of the said account had bound herself to be responsible for the bad debts incurred by the
- E client, Joseph Lee. It is an undisputed fact that the contra losses were incurred through trades handled by the defendant for the said Joseph Lee. In light of the fact that no monies had been recovered from Joseph Lee who has now been adjudged a bankrupt, the defendant would be responsible for making good Joseph Lee's losses.
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THE DEFENDANT'S COUNTERCLAIM

- G [34] The defendant has counterclaimed for a sum of RM549,871.48, interests and costs. In para 8 of her counterclaim, she sets out the particulars of how the sum of RM549,871.48 was arrived at, which amounts were allegedly 'deducted from monies due to the defendant which would otherwise (have) been rightly borne by the plaintiff'. The plaintiff has denied this counterclaim.

- H [35] It is the defendant's case that the IBS scheme was unlawful and improper in two respects. Firstly, she alleges that the indemnity provision was unfair and secondly, she questions the deduction of certain items from the calculation of bonus under the incentive bonus scheme.

- I [36] The defendant has submitted at length on the IBS which she contends is unlawful and unenforceable. In summary, the defendant is saying that it is inconceivable and unjust for her, a mere employee of the plaintiff, to be expected to indemnify the plaintiff for its client's losses and debts.

[37] The plaintiff, on the other hand, has submitted that the issue about the unfairness of the IBS was never pleaded by the defendant. Upon a careful perusal of the pleadings, I would agree with the plaintiff on this issue. At best, the defendant had only pleaded that the IBS 'had in certain regards and aspects of the scheme contravened provisions in law contractually and with regards (to) employment'. I do not view this pleading as such to amount to a pleading about the unfairness of the IBS. Accordingly, I find that the defendant, not having pleaded the unfairness of the IBS, is not entitled to rely on this argument. More so where the defendant is relying on that same IBS, which she claims is unfair, as the basis for her counterclaim.

[38] The court will next consider the question of whether the IBS is unlawful. It is true that nowhere in the offer of employment or in Appendix I is there a provision for any kind of indemnity. Although the service agreement executed by the defendant does not use the actual word 'indemnity', however vide cl 2.3, the defendant had agreed that she would:

2.3 On demand pay and make good to my Employers the amount of all loss, damage and expense which may be sustained or incurred by my Employers by or through the non-fulfillment of any of the obligations hereinbefore contained, or by or through any act, neglect or default done, permitted, or suffered by me at any time while I am in the service of my Employers.

[39] This clause can be viewed as imposing a burden on the defendant to pay the plaintiff for, inter alia, any loss suffered by the plaintiff by or through any act or default done, permitted or suffered by the defendant whilst in the service of the plaintiff. This clause would be broad enough to cover a situation where the plaintiff suffers loss through the acts or defaults of the defendant when putting in trades of the clients of the plaintiff managed by her.

[40] Reference is made to the case of *Mayban Securities Sdn Bhd v Kassim Mahat* [2008] 8 CLJ 715 where the High Court held that the defendant was liable to indemnify the plaintiff by virtue of the indemnity clauses in the agreement signed by the defendant. Similarly, in the case *Sime Securities Sdn Bhd (formerly known as UMBC Securities Sdn Bhd) v Wong Kok Wah* [2005] 4 MLJ 621, the High Court allowed the claim of the plaintiff (a stockbroking company) against the defendant (a dealer's representative) based on a contractual term in the agreement which he had signed wherein he had agreed to indemnify the plaintiff against all losses, liabilities, claims and demands that may be suffered or incurred in connection with and arising from trades dealt with by the defendant.

A [41] I am of the strong view that the absence of an express indemnity provision in the offer of employment, in Appendix 1 and even in the service undertaking does not prima facie mean that the IBS and the defendant's acceptance of it was unlawful. The employment of the defendant vide the offer of employment brings with it an initial monthly salary of RM5,000 per month. Irregardless of the defendant's participation in the IBS, and even if she is not entitled to the incentive bonus by virtue of the fact that the sum total of her deductions exceeds the figure representing 25% of the net commission, she would nevertheless still receive her monthly salary. The incentive bonus is *in addition to*, and constitutes an incentive towards improved and better performance.

D [42] The court has carefully weighed all the evidence adduced when considering the defendant's complaint about the deduction of certain items from the calculation of bonus under the IBS. I would accept the evidence of the plaintiff's witnesses as regards the IBS — that it is a scheme designed to pay bonuses to paid dealer's representatives to motivate them to be more productive. The bonus is paid from the commission earned by the plaintiff, which commission was income generated from the buying and selling of shares in the clients' accounts managed by the said dealers' representatives.

F [43] The incentive bonus is a discretionary bonus. It is noted that although all licensed company's dealer's representatives were eligible for the IBS, however, eligibility was subject to the management's approval. It is further noted that the IBS document contained terms and conditions and the dealer's representatives, including the defendant, had accepted the IBS on those terms. The IBS document at Appendix A contains the defendant's signature to signify her acceptance of its terms. There is no suggestion that anyone had forced her to sign her acceptance.

G [44] Paragraph E of the IBS sets out the method or manner of calculating the amount of incentive bonus that would be payable by the plaintiff. From the gross commission, the plaintiff would first deduct interest due to it from clients and the cost of stock operations, which refers to profits or losses arising from the use of internal accounts, to arrive at the net commission. From a figure equivalent to 25% of the net commission, the plaintiff would deduct various items such as monthly remuneration, monthly deductions from salary, entertainment and travelling expenses as well as bad debts and contra losses to arrive at the net amount payable. Where the amount of the deductions is more than the figure representing 25% of the net commission, the dealer's representative would not be entitled to the incentive bonus.

[45] The court confesses to an inability to comprehend the argument of learned counsel for the defendant that 'the items under the items 1 to 14, set

out in the table at para 8 of our counterclaim, are amounts which the plaintiff either withheld or deducted from amounts payable to the defendant from her entitlement portion of brokerage commission earned by the plaintiff, from transactions handled by her under the scheme’.

[46] After carefully perusing all the evidence adduced and having regard to the submissions and authorities submitted by both parties, I find that there is no basis or merit in the defendant’s counterclaim. It is the court’s finding that the alleged unlawful deductions complained of by the defendant were not in truth deductions to the defendant’s salary but was merely the method employed by the plaintiff to calculate or arrive at the quantum of incentive bonus that the defendant would have been entitled to be paid. The defendant does not dispute the method of calculating the incentive bonus. I am thus of the view that the plaintiff is commission earned by the plaintiff, which commission was income generated from the buying and selling of shares in the clients’ accounts managed by the said dealers’ representatives.

[47] Based on the totality of the evidence adduced and supported by contemporaneous documents, I find that the plaintiff has succeeded in making out its case against the defendant on a balance of probabilities. The plaintiff’s claim is hereby allowed with costs. The court further finds that there is no merit in the defendant’s counterclaim which is accordingly dismissed.

Plaintiff’s claim allowed with costs. Defendant’s counterclaim dismissed.

Reported by Kanesh Sundrum

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